No. 217

No. 12,953

SUPREME COURT, U.S.
FILED
JUN 22 1957
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals for the Sixth Circuit

MORRIS W. ZACK and SARAH ZACK,
Petitioners and Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee

ON REVIEW FROM THE TAX COURT OF THE UNITED STATES

APPELLANTS' APPENDIX

MORRIS GARVETT,
CHARLES L. LEVIN,
Attorneys for Petitioners and Appellants,
1250 Penobscot Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

TABLE OF CONTENTS OF APPENDIX

	Page
Decision of Tax Court	75a
Docket Entries	1a-3a
Motion for Rehearing	76a-79a
Notice Reassigning Proceeding	67a
Opinion of Tax Court	67a-75a
Petition for Review	80a-81a
Petitioner's Exhibit 27—Petition filed in the Municipal Court of Cleveland, Ohio	64a-66a
Stipulation of Facts	3a-24a
Exhibit 1-A—Agreement, dated March 20, 1948 between H. J. Johnson Co. and Sam Breakstone	10a-11a
Exhibit 4-D—Agreement and joint venture, dated April 13, 1948, signed J. H. Tyroler, Sam Breakstone and M. W. Zack	12a-13a
Exhibit 6-F—Supplemental agreement, dated April 30, 1948, between H. J. Johnson Company and Sam Breakstone, et al.	13a-16a
Exhibit 7-G—Letter, dated August 28, 1950, sent to Taylor Machine Co. by Tyroler Metals Co.	17a
Exhibit 8-H—Letter, dated September 8, 1950, sent to Joseph H. Tyroler by McGrath and Company	17a
Exhibit 9-I—Agreement, dated September 11, 1950, between Joseph H. Tyroler et al. and Parkersburg Junk Co.	18a-21a
Exhibit 10-J—Memorandum, dated September 11, 1950, assigning all interest of Sam Breakstone to J. H. Tyloler	21a-23a

Page

Exhibit 11-K—Bill of sale, dated September 11, 1950, executed by Sam Breakstone to J. H. Tyroler 24a

Transcript of Testimony 25a-63a

Zack, Morris W.—
Direct Examination 25a-38a
Cross Examination 38a-43a
Re-direct Examination 43a-44a

Zack, Eugene—
Direct Examination 44a
Cross Examination 44a-45a

Breakstone, Samuel—
Direct Examination 46a-51a
Cross Examination 51a-63a
Re-direct Examination 63a

IN THE

United States Court of Appeals for the Sixth Circuit

No. 12,953

MORRIS W. ZACK and SARAH ZACK,
Petitioners and Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee

ON REVIEW FROM THE TAX COURT OF THE UNITED STATES

APPELLANTS' APPENDIX

DOCKET ENTRIES

(The Tax Court of the United States, No. 52987)

1954

May 18. Petition received and filed; taxpayer notified; fee paid.

May 19. Copy of petition served on General Counsel.

May 18.	Request for Circuit hearing in Detroit, Michigan filed by taxpayer; 5/21/54 granted.
July 6.	Answer filed by General Counsel.
July 8.	Copy of answer served on taxpayer, Detroit, Michigan.
Dec. 16.	Hearing set February 21, 1955, Detroit, Michigan.
	1955
Feb. 25.	Hearing had before Judge Withey, on merits; trial memorandum and stipulation of facts filed; briefs due May 11, 1955; replies due June 10, 1955.
Mar. 21.	Transcript of hearing 2/25/55 filed.
May 6.	Motion for extension to June 10, 1955 to file briefs with reply briefs due 30 days thereafter filed by General Counsel; 5/10/55 granted.
June 10.	Brief filed by taxpayer; printed; 6/13/55 copy served.
June 10.	Brief filed by General Counsel.
June 10.	Motion to change transcript, embodying change, filed by General Counsel, with no objection by petitioner thereon; 6/14/55 granted.
July 11.	Reply brief filed by taxpayer; copy served.
Dec. 6.	Notice reassigning proceeding to Judge Murdock, (Div. 3).
Dec. 30.	Findings of fact and opinion filed, Murdock, Judge; decision will be entered under Rule 50; 12/30/55 copy served.
	1956
Feb. 21.	Agreed computation for entry of decision filed.
Feb. 24.	Decision entered; Murdock, Judge, Div. 3.
Apr. 9.	Motion for re-hearing filed by petitioner; 4/9/56 denied.
Apr. 24.	Motion to fix amount of bond on appeal filed by petitioner.
Apr. 27.	Order fixing amount of bond at $10,000.00, entered.

May 14. Bond in the amount of $10,000.00 approved and filed.
May 14. Petition for review by United States Court of Appeals, Sixth Circuit, filed by petitioner.
May 14. Proof of service filed.
May 18. Petition for review by United States Court of Appeals, Sixth Circuit, filed by respondent.
May 18. Notice of filing petition for review sent to Morris Garvett, Esq., filed.
June 11. Order extending time for filing record on review and docketing petitions for review to August 11, 1956, entered.
July 30. Stipulation for dismissal of respondent's petition for review filed.
July 31. Order dismissing respondent's petition for review, entered.

STIPULATION OF FACTS

It is hereby stipulated and agreed between the parties by their respective counsel, that the following facts shall be taken as true. This stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or the right to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

1. The petitioners filed joint income tax returns for the years in issue with the Collector of Internal Revenue for the District of Michigan, at Detroit, Michigan, and both petitioners are residents of the City of Detroit, State of Michigan.

2. On March 20, 1948, H. J. Johnson Company of Columbus, Ohio, and one Sam Breakstone of Cleveland, Ohio, entered into an agreement whereunder H. J. Johnson Company agreed to sell and Mr. Breakstone agreed to purchase 1,565 two motor 110 volt D. C. electric bomb hoists, motors being ½ h.p., each hoist being packed in the

original oak boxes, with accompanying electric cords, at the price of $15.00 each, f.o.b. cars Columbus, Ohio. The agreement recites payment by Mr. Breakstone of $1,000 at the time of execution thereof, and sets forth Mr. Breakstone's agreement to make additional payments at varying intervals, against which he was to receive partial shipments of the bomb hoists as provided for in the agreement, and his agreement to pay for all of the bomb hoists within 90 days of the date of the agreement. A photostatic copy of said agreement is attached hereto and made a part hereof as "Exhibit 1-A". Said bomb hoists were manufactured for use by the Armed Forces and were declared surplus some time following the conclusion of World War II.

3. On or about March 25, 1948, Mr. Breakstone made a $1,000 payment under the terms of the agreement of March 20, 1948, as evidenced by a photostatic copy of a letter from H. J. Johnson Company to Mr. Breakstone dated March 25, 1948, attached hereto as "Exhibit 2-B."

4. On April 15, 1948, H. J. Johnson Company wrote Mr. Breakstone acknowledging further receipts from him and payment through the date thereof of the sum of $4,000 under the contract, as evidenced by a photostatic copy of such letter attached hereto as "Exhibit 3-C."

5. In the interim between April 15, 1948, and April 30, 1948, Mr. Breakstone paid H. J. Johnson Company an additional $1,000 under the terms of the contract of March 20, 1948.

6. On April 13, 1948, Mr. Breakstone and one Joseph H. Tyroler and the petitioner, Morris W. Zack, entered into an agreement entitled "Agreement and Joint Venture," a copy of which is attached hereto as "Exhibit 4-D," wherein the basis of Mr. Tyroler's and Mr. Zack's participation in the purchase of the bomb hoists is set forth.

7. On April 30, 1954, H. J. Johnson Company entered into a letter agreement with Mr. Breakstone, a photostatic copy of which is attached hereto as "Exhibit 5-E." In said

letter agreement, H. J. Johnson Company acknowledged receipt of previous payments on the March 20, 1948 contract totaling $5,000.00, and said letter agreement sets forth the agreement of H. J. Johnson Company and Mr. Breakstone that a discount of $2,250.00 would be allowed on the March 20, 1948 contract, and said letter agreement also acknowledges payment of the adjusted balance owing, namely, $16,000.00, so that the total purchase price actually paid for the bomb hoists was $21,000.00.

8. On April 30, 1948, H. J. Johnson Company on the one hand, and Mr. Breakstone, Mr. Tyroler and Mr. Zack on the other hand, entered into an agreement entitled "Supplemental Agreement," a photostatic copy of which is attached hereto as "Exhibit 6-F," wherein the agreement with respect to the allowance of the $2,250.00 discount is set forth and receipt is acknowledged by H. J. Johnson Company of the sum of $16,000.00 paid by certified check drawn by Mr. Tyroler in favor of H. J. Johnson Company.

9. Although varying numbers of bomb hoists are referred to in the documents previously mentioned and in those hereafter described, the total number of bomb hoists which were received by Messrs. Breakstone, Tyroler and Zack was 1499.

10. On June 18, 1948, four bomb hoists were sold as samples to Gimbel Bros. for a price of $65.00 each, and one each was shipped to said concern in care of its stores at New York City, Philadelphia, Pennsylvania, Pittsburgh, Pennsylvania, and Milwaukee, Wisconsin. The net amount realized on such sale was $257.40, an allowance of $1.30 each having been made in the cases of the bomb hoists destined for the Pittsburgh and Milwaukee stores.

11. Gimbel Bros. did not purchase any other bomb hoists from Messrs. Breakstone, Tyroler or Zack.

12. On or about February 15, 1950, Mr. Tyroler granted an option to Taylor Machine Company to purchase 200 or 204 bomb hoists and $1,000 was paid for said option by Taylor Machine Company to Mr. Tyroler. Four bomb

hoists were sent to Taylor Machine Company. On August 28, 1950, Mr. Tyroler wrote to Taylor Machine Company, a copy of the carbon copy of that letter being attached hereto as "Exhibit 7-G," wherein it is stated that Taylor Machine Company had declined to exercise said option, and whereby Mr. Tyroler returned to that concern his check for $766.00, retaining $234.00 on account of the four bomb hoists which were sent to and retained by Taylor Machine Company.

13. On September 8, 1950, McGrath and Company purchased through Mr. Tyroler 200 of the bomb hoists for a purchase price of $100.00 each, as evidenced by the attached photostatic copy of a letter from McGrath and Company to Mr. Tyroler dated that day, marked "Exhibit 8-H."

14. On September 11, 1950, a certain agreement was entered into, a photostatic copy of which is attached hereto as "Exhibit 9-I." Said agreement was signed by Mr. Tyroler and by Mr. Breakstone, and Mr. Tyroler signed: "Morris W. Zack per J. H. Tyroler," all as Sellers, and by Parkersburg Junk Company, as Buyer, and whereunder it was agreed that a quantity of bomb hoists would be sold by the Sellers to the Buyer for a purchase price of $100.00 each.

15. Also on September 11, 1950, Mr. Tyroler and Mr. Breakstone entered into a letter agreement, a copy of which is attached hereto as "Exhibit 10-J." It is there recited, among other things, that in consideration of the payment by Mr. Tyroler of the sum of $26,250.00 to Mr. Breakstone, Mr. Breakstone sold and transferred to Mr. Tyroler a one-third interest in the bomb hoists and all of his interest in the said agreement (Exhibit 9-I hereto) entered into with Parkersburg Junk Company earlier that day.

16. Attached hereto as "Exhibit 11-K" is a bill of sale from Mr. Breakstone to Mr. Tyroler which recites the receipt of $26,250.00 by Mr. Breakstone from Mr. Tyroler, and whereunder Mr. Breakstone sold to Mr. Tyroler an undivided one-third interest in the bomb hoists.

17. Under the terms of the arrangement with Parkersburg Junk Company, Parkersburg Junk Company did not have to take the last sixteen bomb hoists. By letter dated October 9, 1950, a photostatic copy of which is attached hereto as "Exhibit 12-L," Parkersburg Junk Company advised Mr. Tyroler that it did not wish to take the last sixteen bomb hoists and requested payment of $1,600.00 therefor. There is attached hereto as "Exhibit 13-M," a check drawn on the Bank of Ohio dated October 11, 1950, to the order of Parkersburg Junk Co. which was endorsed on the reverse side—"Parkersburg Junk Company by Dave Cremer, Treasurer," and which was paid on October 16, 1950, the signature portion of which has been removed. The number of bomb hoists actually sold and delivered to Parkersburg Junk Company was 1275, as evidenced by the photostatic copy of a receipt therefor dated October 4, 1950, signed by that concern, and attached hereto as "Exhibit 14-N."

18. Summarizing the foregoing, the bomb hoists were sold as follows:

Date of Sale	Number Sold	Name of
June 18, 1948.....	4	Gimbel Bros.
February 15, 1950.....	4	Taylor Machine Company
September 8, 1950.....	200	McGrath and Company
September 11, 1950....1275		Parkersburg Junk Company

Sixteen bomb hoists were never sold and have been abandoned.

19. There are attached hereto the following additional documents:

	Exhibit
Check drawn on The Manufacturers National Bank of Detroit dated May 14, 1948, to the order of S. Breakstone and signed by Eugene M. Zack, numbered 445, in the amount of $3,500, which was endorsed on the reverse side: "S. Breakstone."	"15-O"